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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 75.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* THE TWENTY-THIRD STREET RAILWAY COMPANY,

Plaintiff in Error,

against

THE STATE BOARD OF TAX COMMISSIONERS,

Defendants in Error.

In Error to the Supreme Court of the State of New York.

POINTS FOR DEFENDANTS IN ERROR.

JULIUS M. MAYER,
Attorney General of the State of New York.

LOUIS MARSHALL,
Of Counsel.

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Points for Defendants in Error.

This cause was instituted in the Supreme Court of the State of New York by the relator, who prayed that a writ of certiorari might be allowed directed to the defendants in error, for the purpose of reviewing an assessment to the amount of $1,326,114.92 that being the valuation placed

on the special franchises belonging to the relator, such assessment having been made under the provisions of Chapter 712 of the Laws of 1889, which is known as the Special Franchise Tax Law. (Rec. pp. 2-8.)

The questions involved in this cause are substantially identical with those which have been considered in the Points submitted herewith in the case of the People of the State of New York, *ex rel.* The Brooklyn City Railroad Company *vs.* The State Board of Tax Commissioners, which is No. 79 on the present docket. It is, therefore, deemed desirable to avoid repetition, and in consequence the argument presented in that cause will be treated as having been repeated in the present case.

Th differences between these two cases, which will be briefly adverted to, are indicated by the terms of the franchises of the relator, on which the assessment which is attacked in this cause has been based.

The issues herein were referred to Hon. Robert Earl, and were tried in conjunction with those arising in the Brooklyn City Railroad Company case. Independent findings of fact and of law were made by the referee. They appear at Record, pages 76-84.

The opinions rendered in this cause by the referee, the Appellate Division of the Third Department of the Supreme Court and the Court of Appeals are identically the same as those which were delivered in the Brooklyn City Railroad Company case. They appear at Record, pages 125-183.

The special franchises owned by the relator are set forth (Rec. pp. 34-45), and are as follows:

(*a*) New York Laws of 1869, Chapter 823, entitled "An Act to authorize the construction of a railroad through Twenty-third Street in the City of New York."

By the terms of this act the Commissioners of the Sinking Fund of the City of New York were authorized and required to advertise that they would on a certain day and at a certain place to be specified, "sell at public auction, to the highest bidder, the right, privilege and franchise to construct, operate and use a railroad with a double track, and the necessary turnouts and switches for the proper working of the same, through, along and upon Twenty-third Street in the City of New York, from the North River to the East River. Such sale shall be conducted in the ordinary manner of sales at auction, *and the person or corporation who shall offer to pay into the City the largest sum of money for such a right, privilege and franchise, shall receive from said Commissioners a certificate that he or they are entitled to such grant* and are authorized to construct, operate and use the same in accordance with the provisions of this act; such certificate to be issued on the payment within ten days into the City Treasury of the amount of the bid and on the execution of a bond to the said Commissioners in such form and for such amount as they shall prescribe, conditioned that the person or corporation receiving such certificate will, within four months, finish and complete the said road and equip the same with the requisite number of cars and horses."

The act further provides that the party or corporation receiving such certificate, is thereby authorized and empowered to lay, construct and

operate a railroad with a double track through and upon Twenty-third Street in the City of New York, from the North River to the East River, with the necessary connections, turnouts and switches for the proper working of the same.

The act requires that the railroad shall be constructed on the most approved plan, with the rail known as the Philadelphia rail; that it shall be run as often as the convenience of the passengers may require; shall be subject to such reasonable rules and regulations in respect thereto as the Common Council of the City of New York may from time to time by ordinance prescribe, and the said party or corporation is authorized to charge the same rate of fare for the conveyance of passengers upon the railroad as is now charged by other city railroads in the city.

The act also gives certain rights to intersecting railroads, and prescribes the method in which other railroads may be permitted to use any part of the tracks which are authorized to be constructed under the terms of the act.

Section 5 of the act declares:

"The legislature may at any time alter, amend or repeal this act."

(*b*) Chapter 521 of the Laws of 1872, which was supplemental to the act just considered.

By its terms the Comptroller of the City of New York is authorized and directed, on the payment by Sidney A. Yeomans of the sum of $150,000, the amount of his bid accepted and tendered, to the Commissioners of the Sinking Fund on June 10, 1869, or upon the giving of such security for the payment thereof as shall be satisfactory

to the Comptroller, to issue to Yoemans or his assigns the certificate required to be issued under the terms of the act just quoted.

Section 2 of the act provides that Yeomans and his assigns "upon receiving such certificate shall thereby be invested with all the rights, privileges, benefits and franchises that might or could be given or conferred upon him or them by the Commissioners of the Sinking Fund under any or all of the provisions of said act or by said grant."

Section 3, confirming the privileges granted under the preceding act, requires that Yeomans and his assigns shall be required to finish, complete and equip the railroad, the construction of which was authorized, within eight months from the time of receiving the certificate.

(*c*) An assignment from Yeomans, dated July 11, 1872, to the Twenty-third Street Railway Company, of the rights secured by him under the acts specified.

(*d*) A certificate from the Comptroller of the City of New York, in conformity with the terms of the acts of 1869 and 1872.

(*e*) New York Laws of 1873, Chapter 100, entitled "An Act to authorize the Twenty-third Street Railway Company of the City of New York to extend their tracks and use and operate the same."

By this act the corporation was authorized to lay, construct, use and operate railroad tracks in connection with its present railroad through various streets specified, and to intersect, run upon

and use the tracks of other railroads, upon making compensation for such use.

Sections 3 and 4 of the act provided that in the construction, use and operation by the company of the tracks and extensions authorized, it should have and exercise the same rights and privileges which were then possessed and exercised under former grants, and was authorized to charge the same fare for the conveyance of passengers over the extended route as it was then authorized to charge, but "shall not be allowed to charge any additional rate of fare for their entire route or any part thereof, because of the extension hereby granted, and cars shall be run on said extension as often as the convenience of passengers shall require."

(*f*) Lease from the Bleecker Street & Fulton Ferry Railroad Company, dated January 10, 1876, for a term of ninety-nine years, the terms of the lease requiring the relator "to pay taxes, license fees and assessments", the lease remising the franchises and property of the lessor.

The Bleecker Street & Fulton Ferry Railroad Company acquired their franchises under Chapter 514 of the Laws of 1860, and Chapter 199 of the Laws of 1873.

Section 1 of the first of these acts empowered certain designated individuals "to lay, construct, operate and use a railroad with a double or single track, and to convey passengers thereon for compensation", upon certain specified streets.

Section 2 provides:

"Said railroad shall be constructed on the most

approved plan for the construction of city railroads, and shall be run as often as the convenience of passengers may require, and shall be subject to such reasonable rules and regulations in respect thereto as the common council of the City of New York as may from time to time by ordinance prescribe; and for the payment to the city of the same license fee annually for each car thereon as is now paid by other city railroads in said city; and the said persons and their assigns are hereby authorized to charge the same rate of fare for the conveyance of passengers on said railroad as is now charged by other city railroads in said city."

Section 3 gives authority to intersect and run upon other roads, upon making compensation, and Section 4 prohibits the municipal authorities from giving any assent to, or allowing any company claiming to derive authority under the General Railroad Act of 1850, to construct any railroad in or upon any or either of the streets or avenues named in the act, and from doing any other act to hinder, delay or obstruct the operation or construction of the railroad authorized.

The act of 1873 empowers the Bleecker Street & Fulton Ferry Railroad Company to extend its railroad to certain specific streets; authorizes it to use the tracks of other companies, on making compensation; to exercise the same rights and privileges which were possessed and exercised under former grants and laws; to lease all or any portion of its railroad, or consolidate it with any other railroad company. "The said company shall pay to the corporation of the City of New York a license fee for each and every car used by them on said extension, and shall pave and keep in good repair the surface of the streets used by them within the tracks of their said extension."

The corporation is also authorized to charge the same fare for the conveyance of passengers over the route extended as it was then authorized to charge, but not to charge any greater fare for the entire route because of the extension granted. It was also permitted to make arrangements for using transfer tickets.

The franchises which have just been referred to were the subject of consideration in *Mayor &c. of New York v. Twenty-third Street Railway Company, 113 N. Y., 311,* and were there declared to be subject to the reserved power of the Legislature.

It was also held that the license fee of $50 for each car, referred to in Chapter 199 of the Laws of 1873, was compensation merely to the City for the valuable franchises conferred. It was not a tax, and had no relation to the taxing power of the sovereignty. The money paid by the relator under the terms of Chapter 823 of the Laws of 1869 and Chapter 521 of the Laws of 1872 was compensation for the right acquired for the constructing of the railway. It was the consideration of the grant, evidenced by the certificate issued pursuant to the statute, by the public authorities. The *right* to construct a railroad through the streets designated was *sold*, at auction to the highest bidder. The amount of the highest bid was $150,000, and that was paid, not as a tax or in commutation of taxation, on the franchise, for at that time such taxation was not in contemplation, but as a payment for the right or easement purchased. Even that right was expressly subjected to the power of the Legislature, at any time to alter, amend or repeal it. (Rec. pp. 35, 36.)

See Brief of Defendants in Error in No. 79, Point II, subd. (*i*), pages 65 to 76.

It is respectfully submitted that the judgment under review should be affirmed.

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State of New York.

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